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Criminal Law—Double Jeopardy

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v. Connecticut,[32] set out this test for the admissibility of a confession under the fourteenth amendment due process clause:

> Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess; it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.[33]

Compare with this test the very similar requirement under the fifth amendment, namely, that "the confession be made freely, voluntarily, and without compulsion or inducement of any sort."[34]

In conclusion, the test for the admissibility of confession would be virtually the same whether the Washington court used the self-incrimination provision of the state constitution (interpreted in accordance with the analogous provision of the federal constitution) or the due process clause of the fourteenth amendment. In either case the test would preclude the use of RCW 10.58.030.

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Double Jeopardy. In *State v. Connors*,[1] the Washington State Supreme Court held that a defendant had been placed in jeopardy when, sua sponte, a trial court erroneously declared a mistrial over his objection. A later retrial of the defendant therefore constituted double jeopardy.

At the first trial a jury had been impaneled and sworn to try the defendant. No opening statements had been made, and no evidence had been introduced. Although the defendant had not consented to a separation of the jury, several members of the jury separated themselves from the rest of the panel during the noon recess. This fact was called to the attention of counsel, and the defendant consented to a separation of the rest of the jurors for the remainder of the recess. Afterwards, on its own motion, the court declared a mistrial over a timely objection by the defendant. Subsequently, the defendant was tried and convicted of an identical charge, over his objection based on double jeopardy.

On appeal, the supreme court reversed. The court held (1) that the mistrial had been improperly granted, and, (2) that the second trial

[32] 367 U.S. 568 (1961).
[33] *Id.* at 607.
[34] Wilson v. United States, 162 U.S. 613, 620 (1896).

[1] 59 Wn.2d 879, 371 P.2d 541 (1962).

constituted double jeopardy. To reach the latter conclusion the court reasoned that a mistrial which is improperly granted over a timely objection, violates the right of a defendant to a trial by a jury which he has accepted and which has been impaneled and sworn to try his case. There is an admitted incongruity in the court's position: On the one hand, the trial judge declared the mistrial in an effort to insure procedural fairness to the defendant; yet on the other hand, this effort was held by the appellate court to bar a second fairly-prosecuted action.

Washington statutory provisions concerning the subject of double jeopardy are in conformity with the federal constitution. In *Palko v. Connecticut*,[2] the United States Supreme Court held that, without violating the due process clause of the fourteenth amendment, a state may retry an acquitted defendant, where the acquittal was erroneous. Since the federal constitutional provision against double jeopardy was found to be "not of the very essence of a scheme of ordered liberty,"[3] it was found not to be a part of the fourteenth amendment. This interpretation affords the states considerable latitude in framing their own law with respect to double jeopardy. Washington has availed itself of this opportunity.

There are several relevant Washington statutes.[4] One of them specifically allows retrial of defendants in felony cases where, in certain specified circumstances, the prosecution has been dismissed:[5]

> RCW 10.43.010 *Dismissal, when a bar.* An order dismissing a prosecution under the provisions of RCW 10.37.020, RCW 10.46.010, and RCW 10.46.090 shall bar another prosecution for a misdemeanor or

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[2] 302 U.S. 319 (1937).

[3] 302 U.S. at 325. In a recent case, Bartkus v. Illinois, 359 U.S. 121 (1959), the Court traced the development of the constitutional provision against double jeopardy and its relation to state prosecution, concluding by rejecting a defense argument that *Palko* should be overruled. For another recent discussion of the federal constitutional provision against double jeopardy in relation to state prosecutions, see Hoag v. New Jersey, 356 U.S. 464 (1958) ; Annot., 2 L. Ed. 2d 2020 (1958).

[4] RCW 10.43.010 *Dismissal, when a bar, incorporating by reference;* "RCW 10.37.020 *Indictment or information—Time for filing;* RCW 10.46.010 *Trial within sixty days;* and, RCW 10.46.090 *Nolle prosequi.*" For the text of RCW 10.37.020 and RCW 10.46.010, see note 6 *infra.* For the text of RCW 10.46.090, see note 7 *infra.* Constitutionality of this statutory scheme has been upheld on the grounds that where an indictment or information has not been filed (RCW 10.37.020) or where trial has not begun (RCW 10.46.010), prosecution has not proceeded to a point where jeopardy has attached, and, where the action is dismissed because of prejudicial error, in the furtherance of justice, (RCW 10.46.090) the first action could not subject the defendant to jeopardy because no valid conviction could result. On this subject, see the annotations to RCW 10.43.010. See also, State v. Silver, 152 Wash. 686, 279 Pac. 82 (1929), State v. Burns, 54 Wash. 113, 102 Pac. 886 (1909), State v. Costello, 29 Wash. 366, 69 Pac. 1099 (1902).

[5] Wash. Sess. Laws 1881, ch. 66 § 777.

> gross misdemeanor where the prosecution dismissed charged the same misdemeanor or gross misdemeanor; but in no other case shall such order of dismissal bar another prosecution.[6]

Under another statute, RCW 10.46.090 (listed in RCW 10.43.010 above),[7] the court has discretionary power to order dismissal on its own motion in the furtherance of justice. When a court properly exercises its discretion, then RCW 10.43.010 specifically provides that a dismissal shall not bar a subsequent felony prosecution.

These statutory provisions and the general question presented in the *Connors* case have previously been before the Washington court. In the first case, *State v. Kinghorn,*[8] the jury had been impaneled and introduction of evidence had started when the defendant moved for dismissal on the grounds that he had not been arraigned and had not pleaded. Denying the motion, the court arraigned the defendant and entered a plea of not guilty. The prosecution then moved to dismiss, and the court granted this motion over objection by the defendant. Kinghorn was promptly retried and convicted over his timely objection based on double jeopardy. On appeal, the supreme court reversed, holding that

> when the accused has been placed upon trial in a court of competent jurisdiction on a sufficient indictment, before a jury legally impaneled and sworn, the constitutional peril has attached, and a discharge of the jury *without good cause* and *without the consent of the accused* is equivalent to an acquittal. (Emphasis added.)[9]

The doctrine of double jeopardy was properly applied in *Kinghorn* to bar the second conviction. It has long been held that the statute allowing retrials in felony cases must be strictly construed (because it

[6] RCW 10.37.020 and RCW 10.46.010 are quoted in full here; however, neither is applicable to the subject of this casenote. RCW 10.37.020 *Indictment or information—Time for filing.* "Whenever a person has been held to answer to any criminal charge, if an indictment be not found or information filed against him within thirty days, the court shall order the prosecution to be dismissed; unless good cause to the contrary be shown." RCW 10.46.010 *Trial within sixty days.* "If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his own application, be not brought to trial within sixty days after the indictment is found or the information filed, the court shall order it to be dismissed, unless good cause to the contrary is shown."

[7] RCW 10.46.090 *"Nolle prosequi.* The court may, either upon its own motion or upon application of the prosecuting attorney, and in furtherance of justice, order any criminal prosecution to be dismisssed; but in such case the reason of the dismissal must be set forth in the order, which must be entered upon the record. No prosecuting attorney shall hereafter discontinue or abandon a prosecution except as provided in this section."

[8] 56 Wash. 131, 105 Pac. 234 (1909).

[9] 56 Wash. at 132, 105 Pac. at 235.

is an exception to the common law rule).[10] The court found that the dismissal involved was not required in the interests of justice; it was granted in error[11]—hence the dismissal was not proper under RCW 10.46.090. Under RCW 10.43.010 (quoted above),[12] the only relevant exception to the operation of the doctrine of double jeopardy is a dismissal granted "in furtherance of justice" under RCW 10.46.090. Since the dismissal in *Kinghorn* was not granted under RCW 10.46.090, it was not within the only relevant exception to the operation of the double jeopardy rule.[13] Since the state could not appeal the first dismissal,[14] there was no way for the state to obtain review of the error of the trial court in the first instance.

Subsequent to the *Kinghorn* case, the 1925 legislature enacted a statute granting the state certain rights of appeal:

> In criminal cases the state may appeal to the supreme court, upon giving the same notice as is required of other parties, when the error complained of is based on the following: (1) The setting aside of an indictment or information; (2) The sustaining of a demurrer to an indictment or information; (3) An order arresting judgment on any grounds; (4) An order granting to anyone, convicted by a jury, a new trial on any grounds; (5) Any order which in effect abates or determines the action, or discontinues the same, otherwise than by an acquittal of the defendant by a jury: *Provided,* That in no case shall the state have a right to an appeal where the defendant has been acquitted by a considered verdict of a jury.[15]

State v. Brunn[16] was the first case where the court considered the relationship between the newly enacted appeals statute and the prior statutory provisions. In this case, a prosecution for receiving stolen goods was dismissed by order of the court on the ground that the evidence was not sufficient to sustain a verdict of guilty. Upon finding that the evidence *was* sufficient to go to the jury, the supreme court reversed the order of dismissal and remanded the case for a new trial.

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[10] State v. Johnson, 24 Wash. 75, 63 Pac. 1124 (1901).
[11] 56 Wash. 131, 105 Pac. 234 (1909).
[12] See text accompanying note 6 *supra.*
[13] *Cf.* State v. Ulmo, 19 Wn.2d 663, 143 P.2d 862 (1943). (RCW 10.73.020 was not considered. See text accompanying notes 15-20 *infra.*)
[14] The state did not have the right of appeal until 1925, when RCW 10.73.020 was adopted. This statute is now in force as WASH. RULES, APPEAL 14(8), 34A Wn.2d 20, 21 (1950). See note 15 *infra* and accompanying text.
[15] Wash. Ex. Sess. Laws 1925, ch. 150, § 7, codified as RCW 10.73.020, and now adopted verbatim as WASH. RULES, APPEAL 14(8), 34A Wn.2d 20, 21 (1950).
[16] 22 Wn.2d 120, 154 P.2d 826, 157 A.L.R. 1049 (1945).

It specifically overruled *State v. Kinghorn*[17] and *State v. Ulmo*.[18] The court rejected a constitutional challenge to the new act, stating that "the wording of the act plainly indicates that its dominant purpose was to abolish the finality of *one-man* acquittals."[19] The court held that this purpose was well within the constitutional limits of *Palko v. Connecticut*.[20]

Following the *Brunn* case, the Washington court had several opportunities to consider the scope and operation of the statutory scheme of double jeopardy. In *State v. Portee*,[21] the court held that a directed verdict granted on the motion of the defendant is appealable under the statute. The court reasoned that a directed verdict is an "order which . . . abates . . . the action otherwise than by an acquittal . . . by a jury" within the meaning of the statute, because it amounts to a verdict by the judge instead of the jury.[22] The court has also held that the state may appeal from an order of dismissal, with[23] or without,[24] prejudice. The nature of the dismissal (directed verdict, mistrial, dismissal with prejudice, etc.) is unimportant in determining the application of the statutory rules of double jeopardy. So too is the character of the moving party (prosecutor, defense counsel, or the court). When the court grants dismissal "in furtherance of justice,"[25] the statute makes no distinction on the basis of who is the moving party. Consequently, the fact that the dismissal in *Connors* was granted by the court on its own motion does not distinguish the case from *Kinghorn* or other cases where the prosecution sought the dismissal.

The dissent in *Connors* points out that the case is on all fours with *Kinghorn* and that *Kinghorn* has been overruled.[26] This appears to be an accurate statement of the law, the implicit and logical extension of which is that any appeal by the state under the provisions of WASH. RULES, APPEAL 14(8) should be dismissed as moot. If the supreme court were to have reversed the dismissal, there would have been a retrial under the rule of *State v. Brunn*.[27] If the supreme court were

[17] 56 Wash. 131, 105 Pac. 234 (1909).
[18] 19 Wn.2d 663, 143 P.2d 862 (1943).
[19] 22 Wn.2d at 137, 154 P.2d at 834.
[20] 302 U.S. 319 (1937).
[21] 25 Wn.2d 246, 170 P.2d 326 (1946).
[22] 25 Wn.2d at 248, 249, 170 P.2d at 327.
[23] State ex rel. Clark v. Hogan, 49 Wn.2d 457, 303 P.2d 290 (1956).
[24] State v. Buckman, 51 Wn.2d 827, 322 P.2d 881 (1958).
[25] RCW 10.46.090. See note 7 *supra* and accompanying text.
[26] 59 Wn.2d at 889, 371 P.2d at 548 (dissent).
[27] 22 Wn.2d 120, 154 P.2d 826, 157 A.L.R. 1049 (1945). *Accord,* State v. Stacy, 43 Wn.2d 358, 261 P.2d 400 (1953).

to hold that the dismissal was properly granted, the state could still retry the defendant under the provisions of RCW 10.43.010.[28] Since a felony action ending in either a proper[29] or improper[30] dismissal can never bar retrial, double jeopardy should never be at issue in an appeal of a conviction on retrial.

Remaining for consideration are the vital policy questions which led the *Connors* court to its apparent departure from settled law. This problem is raised by the dissent which quotes extensively from the *Brunn* case:

> There was a period in England when many of the judges apparently considered it their judicial duty to obtain convictions in all criminal cases which came before them for trial. To that end, if it appeared during the trial that the jury was not likely to convict, it became the practice to discharge that jury, and impanel another, and in some cases, a third or fourth if necessary. The tyranny and injustice of such a procedure is obvious . . . .[31]

In detailing the considerable extent to which judges of that period participated in prosecutions, the dissent fails to mention that the statutory scheme of double jeopardy would open the door to precisely the same type of participation by trial court judges in Washington. Modern criminal procedure precludes *any* partisan participation by the trial court on either side in the conduct of a criminal action. The statutory *Brunn* rule would allow the court to dismiss at any point in the proceeding on its own discretion, whether or not that discretion was properly exercised.

Suppose a trial court were convinced both that the prosecution had a meritorious case and that because of developments in the trial the prosecution had only a slight chance of success. Under the rule alluded to, the trial court *could* aid the prosecution by granting a dismissal *which would not be subject to appellate review* on the motion of the *defendant*.[32] Even the opportunity for such an intervention by the trial court appears to be an invasion of the adversary system.

When a judge ostensibly dismisses an action to protect the rights of a defendant, and such dismissal is in error (as in *Kinghorn*, *Connors*, and *Brunn*), the usual result is that the defendant's case is prejudiced

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[28] See RCW 10.43.010 at text accompanying note 6 *supra*.
[29] *Ibid.*
[30] State v. Stacy, 43 Wn.2d 358, 261 P.2d 400 (1953).
[31] 59 Wn.2d at 892, 371 P.2d at 548 (dissent).
[32] Such an appeal should be dismissed as moot. See notes 27-30 *supra* and accompanying text.

to some degree. Where the facts are identical with those of the *Connors* case (dismissal before opening statement), the rule contended for by the dissent could probably be applied without prejudice to the defendant. At the opening-statement stage, the defendant reveals the theory of his case. Past this point, any dismissal by the court will usually prejudice the defendant's conduct of his defense in the second action because the prosecution will be able to prepare its case to meet the defense.[33]

The court did not explicitly consider or discuss these matters in the *Connors* opinion. Such considerations appear to be material for they furnish a rational basis for the application of the rule of *Connors* to other fact situations where dismissal might prejudice a defendant because trial courts will be discouraged from participating in the conduct of a trial in an adversary role. On the other hand, the *Connors* decision will tend to discourage the trial court from ordering dismissals which, in fact, would be in the interests of justice. It is suggested that the court might have been more precise and should have framed a rule giving further recognition and consideration to the policy arguments, thereby giving the trial courts guidelines within which to resolve the dilemma (between the statutory rules and the *Connors* decision).

DAVID W. SANDELL

Insanity Defense to First Degree Murder Charge—M'Naghten Reaffirmed. Don Anthony White, a Negro in his mid-twenties, was convicted of first degree murder by a King County jury. In *State v. White*,[1] the Washington Supreme Court (three judges dissenting) affirmed the conviction and sentence which directed that the death penalty be imposed.

At trial, the defendant admitted beating the deceased woman in the laundry room of the Yesler housing project on the morning of December 24, 1959. It was established that she died as a result of this beating. The accused defended on the basis of mental irresponsibility.[2]

The evidence established that defendant White had never seen or known of the victim prior to the fatal beating. An exhaustive presenta-

[33] Note that a rule to the effect that a dismissal will bar a second action only if the defense has made its opening statement would force defense counsel to make an opening statement in every case, thus further implicating the court in trial tactics.

[1] 160 Wash. Dec. 554, 374 P.2d 942 (1962).

[2] RCW 10.76.010 provides: "Any person who shall have committed a crime while insane, or in a condition of mental irresponsibility, and in whom such insanity or mental irresponsibility continues to exist, shall be deemed criminally insane . . . ." RCW